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No. 08-21

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AGRI PROCESSOR CO., INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

1. This case concerns the continuing vitality of a decision rendered by this Court in 1984 construing the term "employee" in the NLRA. That term does not, by its plain language, resolve the issue whether illegal aliens may vote in a union election. In 1984 this Court held that since there was then no federal law "making it unlawful for an employer to hire an alien who is present or working in the United States without appropriate authorization" (*Sure-Tan, Inc. v. National Labor Relations Board*, 467 U.S. 883, 892-893 (1984)), the NLRB's view that illegal aliens are

"employees" – albeit "counterintuitive" – was "compatible" with federal immigration law.

That is no longer true. The 1986 amendment to the federal immigration laws has eradicated the premise on which a majority of this Court (with Justices Powell and Rehnquist dissenting) arrived at its 1984 decision. In its Brief in Opposition, the NLRB challenges our argument that this major shift in national policy warrants the overruling of the *Sure-Tan* decision, citing Justice Stevens' dissent in *TWA v. Franklin Mint Corp.*, 466 U.S. 243, 273 (1984). Br. in Opp. 11. But *Franklin Mint* concerned the explicit and unambiguous terms of the Warsaw Convention of 1929, an international treaty that was still in effect when the *Franklin Mint* case was decided.

Petitioner is not asking this Court to declare that because of changed circumstances the plain terms of a treaty or statutory provision are unenforceable, as the plaintiff did in *Franklin Mint*. The issue in this case concerns not the implementation of explicit terms in a statute or treaty but the continued viability of a decision of this Court construing a broadly worded statutory term.

2. Consequently, the relevant precedents of this Court are cases in which this Court has overruled decisions construing federal statutes in light of policies or events that post-dated the statutes. See Pet. 8-9. This Court also recently held, in a unanimous opinion by Justice Stevens, that a 1988 amendment to the Patent Act that eliminated the

market power presumption in patent cases warranted overruling *International Salt Co. v. United States*, 332 U.S. 392 (1947), which had declared tying arrangements to be *per se* violations of the Sherman and Clayton Acts. *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006). The rationale of the *Illinois Tool Works* opinion and decision warrants re-examination of this Court's 1984 *Sure-Tan* decision.

3. The NLRB contends that this Court should give weight to the fact that "Congress did not add an exception to the NLRA for undocumented aliens, or change Section 2(3) [of the NLRA] in any way, when it enacted IRCA (or any subsequent immigration statute . . . .)." Br. in Opp. 11; see also Br. in Opp. 16. This Court has frequently cautioned, however, that it is "reluctant to draw inferences from Congress' failure to act." *Brecht v. Abrahamson*, 507 U.S. 619, 632 (1993), *quoting from Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 306 (1988). "Legislative silence is a poor beacon to follow in discerning the proper statutory route." *Zuber v. Allen*, 396 U.S. 168, 185 (1969).

The NLRB cannot point to any consideration by Congress, in 1986 or thereafter, whether to retain undocumented workers in the NLRA's definition of "employee" or whether to approve or disapprove of the NLRB policy that was enforced in *Sure-Tan* and that was applied by the NLRB in this case. Indeed, even if a statutory provision effectively overruling *Sure-Tan* had been considered and rejected by Congress, that history would not support the

conclusion that the *Sure-Tan* construction should be retained after enactment of the Immigration Reform and Control Act of 1986. "Failed legislative proposals are 'a particularly dangerous ground on which to rest an interpretation of a prior statute.'" *Lockhart v. United States*, 546 U.S. 142, 147 (2005), *quoting from United States v. Craft*, 535 U.S. 274, 287 (2002), *quoting from Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). When, as in this case, there is not even a "failed legislative proposal," this Court's warning against drawing any inference from Congressional inaction follows *a fortiori*.

4. The NLRB also suggests that certiorari should be denied because petitioner allegedly took "a 'wait-and-see' approach to the outcome of a representation election" and the petitioner's asserted reason for refusing to bargain was a "pretext." Br. in Opp. 16-17. These factual allegations were not made before the NLRB, no findings regarding them appear in the record, and neither the NLRB nor the majority of the court below relied on such facts. They cannot, therefore, be invoked as an alternative ground for sustaining the judgments of the NLRB or of the court of appeals. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38 (1989); *Heckler v. Campbell*, 461 U.S. 458, 469 (1983); *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542 (1960).

5. Finally, the NLRB suggests that petitioner could have chosen to request, under *Brooks v. NLRB*, 348 U.S. 96, 101-104 (1954), that the union be decertified rather than refuse to bargain with it.

Br. in Opp. 17, n. 3. This, too, was not a ground argued or relied upon by the NLRB or the court of appeals. And, in any event, if, as petitioner contends, the employees who participated in the election were ineligible, the NLRB should have voided the election and not required petitioner to follow the avenue described in *Brooks*.

For the reasons stated in the Petition for a Writ of Certiorari, the writ of certiorari should be granted.

Respectfully submitted,

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